(10)

No. 87-1054

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1987

THE FIRESTONE TIRE & RUBBER CO., *et al.*,
Petitioners,
v.

RICHARD BRUCH, ALBERT SCHADE,
LEONARD A. SMOLINSKI, *et al.*,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE ERISA INDUSTRY COMMITTEE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTRODUCTION

This case presents two issues of importance under the Employee Retirement Income Security Act of 1974 ("ERISA"). The first issue concerns the standard of review to be applied by a court in reviewing a fiduciary's denial of benefits under an unfunded employee benefit plan regulated by ERISA. The court below held that, even in the absence of any evidence of bias, the reviewing court must apply a *de novo* standard of review, thereby rejecting the view of every other court of appeals that a fiduciary's decision may be reviewed only for arbitrary and capricious conduct. The

second issue concerns the proper scope of the term "participant" as defined in ERISA, a term that identifies a class of persons to whom the administrator must, under threat of penalty, provide detailed information about the benefit plan. The court of appeals construed this term broadly and concluded that plan administrators must provide information concerning the plan to all persons who claim benefits, even if they have no colorable or prospective right to benefits. The resolution of both issues is of great significance to employers who maintain employee benefit plans regulated by ERISA and to employees who rely on these plans.

The ERISA Industry Committee ("ERIC") files this brief *amicus curiae*, with the consent of the parties,[1] in support of petitioners' positions (1) that, absent a showing of bias in fact, a reviewing court must apply the arbitrary and capricious standard of review in an action challenging a denial of benefits; and (2) that the term "participant" is limited to present employees and to former employees who are eligible, or whose present circumstances indicate that they may become eligible, for benefits under a plan regulated by ERISA.

THE INTEREST OF THE *AMICUS CURIAE*

ERIC is a nonprofit association of more than one hundred corporations doing business in a wide variety of United States industries. A list of ERIC's members is set forth in the appendix to this brief.

ERIC's membership comprises a broad cross-section of major firms that maintain pension and welfare plans for their employees. All of ERIC's members do business in

[1] The parties' written consents have been filed with the Clerk of the Court.

more than one state, and some members maintain pension and welfare plans that provide benefits to employees in all fifty states. Most, if not all, of ERIC's members maintain unfunded, employer-administered plans like the one involved in this case. Moreover, the logic of the court of appeals' decision on the "standard of review" issue extends beyond plans that are unfunded and employer-administered, and encompasses plans such as defined benefit pension plans, in which employer contributions are based on benefits expected to become payable.[2] Virtually all of ERIC's members maintain defined benefit pension plans.

Millions of persons are covered by ERISA-governed employee benefit plans. Most claims for benefits made under these plans are granted without controversy. Inevitably, however, some claims are disputed, and some disputed claims result in litigation. Although the litigated cases represent a minute percentage of the aggregate number of claims filed, most of ERIC's members are involved in benefit claim litigation each year. Because imposition of a *de novo* standard of review to benefit claim suits would result in a significant increase in the number and complexity of such suits, ERIC's members have a substantial interest in the resolution of the "standard of review" issue.

In addition, because many of the rights provided by ERISA are available only to plan "participants," this term is of central importance in the administration and enforcement of the statute. The requirement of ERISA that plan administrators disclose to plan participants substantial information about the plan is one of the important provisions of ERISA whose scope depends on the interpretation of this word. Certain types of information must be disclosed to participants as a matter of course on a continuing basis.

[2] *See* p. 13, *infra*.

Plan administrators may be held personally liable to pay substantial damages for the failure or refusal to supply requested information to a participant. All of ERIC's members are subject to the disclosure obligations of ERISA and are subject to suit by participants. Accordingly, ERIC's members have a substantial interest in the resolution of the "participant" issue.

SUMMARY OF ARGUMENT

I.

The language and legislative history of ERISA demonstrate that Congress intended the deferential "abuse of discretion" standard to apply to review of a fiduciary's discretionary actions with respect to a benefit plan. It is beyond question that Congress meant the discretionary actions of plan fiduciaries, including benefit determinations, to be governed by common law trust principles. It is an established rule of trust law that a trustee's discretionary actions are reviewable only for an abuse of discretion, to correct an arbitrary and capricious exercise of the trustee's authority.

That Congress intended this deferential standard to apply is confirmed by the fact that the ERISA enforcement scheme was patterned after that of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 141 *et seq.* At the time of ERISA's enactment, Congress was aware that, in reviewing trustees' actions under a similarly worded provision of the LMRA, the courts had for many years employed the "arbitrary and capricious" standard that had been developed under the law of trusts.

Because the benefit plan in this case is employer-administered, the court of appeals applied a "presumption

of partiality" to the administrator's decision. The court reasoned that such a presumption was required in view of the conflict of interest arising from the administrator's financial stake in the outcome of every benefit determination. However, the law of trusts recognizes no such presumption where the settlor of a trust was aware of the conflict of interest but nevertheless conferred discretionary power on the trustee.

Like the settlor of a common law trust, Congress was aware of the potential conflict of interest when it drafted Section 408(c)(3) of ERISA, 29 U.S.C. § 1108(c)(3), which expressly permits "an officer, employee, agent, or other representative" of an employer to serve as a fiduciary. Congress also drafted the statute to apply the usual rules of trust law to the fiduciary's conduct. There is thus no basis in the statute for applying a different standard of review in the case of decisions by fiduciaries who also are representatives of an employer sponsoring a plan.

By requiring *de novo* review of benefit decisions under a large number of plans, the decision below will have a burdensome impact on the courts and on benefit plans. There is no justification for imposing such costs, particularly since the abuse of discretion standard is sufficiently flexible to protect plan participants and beneficiaries from possible bias by the fiduciary.

II.

Contrary to the decision below, Congress could not conceivably have intended the term "participant" to include former employees who have no colorable claim to benefits under a benefit plan. The court erroneously read the language "any . . . former employee . . . who *may become eligible* to receive a benefit" in the statutory definition as

equivalent to "someone who *claims* to be eligible to receive a benefit." Pet. App. A41.

The words "may become eligible" refer to someone who, based on his present circumstances and activities, would be expected to attain eligibility by virtue of the passage of time, assuming that his underlying circumstances remain unchanged. The decision below, by requiring employers to disclose plan information on a continuing basis and for an unlimited time to any and all former employees, would impose upon benefit plans increased costs that Congress could not have contemplated when it enacted the statute.

In support of its holding, the court of appeals noted that ERISA's enforcement provision states that an action may be brought by a "participant." The court reasoned that, because anyone who claims to be a "participant" would have standing to sue under ERISA, anyone who claims to be eligible for benefits should have the right to receive plan information. This conclusion falls of its own weight, since an individual cannot maintain an action under ERISA merely by asserting, without support, that he is a "participant."

As a practical matter, plan administrators tend to provide plan information to individuals who appear to have a colorable claim to benefits. The danger of the decision below, however, is that it would impose significant costs by requiring the disclosure of individualized information to virtually anyone requesting it, even to a person who has long since left the covered employment and has no arguable claim of entitlement to benefits. Congress certainly did not intend such a result.

ARGUMENT

I. IN ENACTING ERISA, CONGRESS INTENDED THE ABUSE OF DISCRETION STANDARD TO GOVERN REVIEW OF BENEFIT DECISIONS BY PLAN FIDUCIARIES.

The court of appeals has held that the *de novo* standard of review must be applied in reviewing the denial of benefits whenever a plan administrator has a potential conflict of interest. This holding is contrary to the clear intent of Congress in enacting ERISA.

A. Congress Codified The Common Law Of Trusts In ERISA To Govern The Actions of Fiduciaries And Judicial Review Of Those Actions.

Under ERISA, a fiduciary of a benefit plan has broad discretion to manage the operation of the plan, including the authority to "determin[e] the eligibility of claimants." *Fort Halifax Packing Co. v. Coyne*, 107 S. Ct. 2211, 2216 (1987); *see also Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 142 (1985); *id.* at 152-153 & n.8 (Brennan, J., concurring). Section 402 of ERISA provides that one or more "named fiduciaries" of a benefit plan "shall have authority to control and manage the operation and administration of the plan." 29 U.S.C. § 1102(a)(1). This authority plainly includes the authority to make claims decisions, as ERISA further provides that a "full and fair review" of a claim denial shall be made "by the appropriate named fiduciary." *Id.* § 1133(2). The statute expressly permits an employer's representative to serve as a plan fiduciary. *Id.* § 1108(c)(3).

Both the language and history of ERISA make clear that the discretionary actions of a fiduciary in managing a benefit plan are to be governed by principles developed in

the law of trusts. "Congress invoked the common law of trusts to define the general scope of [a fiduciary's] authority and responsibility." *Central States Pension Fund* v. *Central Transport, Inc.*, 472 U.S. 559, 570 (1985). The statute provides a set of substantive standards to which a fiduciary must adhere in his administration of a plan. *See* 29 U.S.C. § 1106(b).

In addition, the manner in which a fiduciary's powers may be exercised "is further defined in the statute through the provision of strict standards of trustee conduct, also derived from the common law of trusts — most prominently, a standard of loyalty and a standard of care." *Central States Pension Fund* v. *Central Transport, Inc.*, 472 U.S. at 570. The standard of care, set forth in the so-called "prudent man rule," provides that in carrying out his duties, a plan fiduciary shall exercise "the care, skill, prudence, and diligence" of a "prudent man acting in like capacity." 29 U.S.C § 1104(a)(l)(B). The standard of loyalty, embodied in the "exclusive benefit" rule, provides that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . for the exclusive purpose of providing benefits to participants and their beneficiaries." *Id.* § 1104(a)(l)(A)(i).

As Justice Brennan pointed out in his concurring opinion in *Massachusetts Mutual Life Ins. Co.* v. *Russell*, 473 U.S. at 156-157, "ERISA's legislative history also demonstrates beyond question that Congress intended to engraft trust-law principles onto the enforcement scheme . . . ." One of the established principles of trust law is that a trustee's discretionary actions are subject to review only for an abuse of discretion.

> Where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion.

Restatement (Second) of Trusts § 187 (1959). *See also*, G. Bogert & G. Bogert, *The Law of Trusts and Trustees* § 560, at pp. 196-208 (2d ed. 1980); III A. Scott, *The Law of Trusts* § 187, at pp. 14-19 (4th ed. 1988).

Congress modeled ERISA's civil enforcement scheme on that of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 141 *et seq. See Pilot Life Ins. Co.* v. *Dedeaux*, 107 S. Ct. 1549, 1555-1558 (1987). Section 302(c)(5) of the LMRA, which governs union-administered benefit plans to which employers make contributions, provides that plan assets are to be "held in trust" and that the trustees are to act "for the sole and exclusive benefit of the employees." 29 U.S.C. § 186(c)(5). For many years prior to the incorporation of this same language in ERISA, the courts had applied a deferential standard, referred to either as an "abuse of discretion" standard or as an "arbitrary and capricious" standard, in reviewing trustees' actions under Section 302(c)(5) of the LMRA.[3] Congress is presumed to have known, at the time of ERISA's enactment, of the deferential standard of review under the common law of trusts and under the LMRA.[4]

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[3] *See, e.g.*, *Kosty* v. *Lewis*, 319 F.2d 744, 747 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 364 (1964); *Gomez* v. *Lewis*, 414 F.2d 1312, 1313-1314 (3d Cir. 1969); *Insley* v. *Joyce*, 330 F. Supp. 1228, 1233-1234 (N.D. Ill. 1971). *See also*, Comment, *The Arbitrary and Capricious Standard Under ERISA: Its Origins and Application*, 23 Duquesne L. Rev. 1033, 1037-1041 (1985).

[4] *See, e.g.*, *Director, Office of Workers' Compensation Programs* v. *Perini North River Associates*, 459 U.S. 297, 319 (1983), *quoting from Cannon* v. *University of Chicago*, 441 U.S. 677, 696-697 (1979) ("We may presume that our elected representatives, like other citizens, know the law").

When Congress incorporated into ERISA the same "exclusive benefit" standard that had governed the discretionary actions of trustees under the common law of trusts and under the LMRA, it was aware that such discretionary actions were reviewable only to correct abuses of the trustees' discretion. By using this language, therefore, Congress undoubtedly also intended to apply the same deferential standard of review that had long been applicable under trust law and under the LMRA.

B. Under Trust Law, The Courts Apply An Abuse Of Discretion Standard Of Review Absent Evidence Of An Actual Conflict Of Interest.

In rejecting the abuse of discretion standard in favor of a *de novo* standard of review, the court of appeals in effect invoked a presumption of partiality against the fiduciary.[5] However, the common law of trusts, which Congress incorporated into ERISA, recognizes no such presumption.

Under the common law, it is well established that application of the abuse of discretion standard of review is appropriate, despite the existence of a conflict of interest, where the settlor of the trust was aware of the conflict but nonetheless conferred discretionary power on the trustee. *See, e.g., Childs v. National Bank of Austin*, 658 F.2d 487, 490 (7th Cir. 1981). When a trustee cannot carry out the purpose of the trust without being subject to a conflict of interest, "it

[5] The court reasoned as follows:

> In the unfunded pension plan at issue in Count I of the complaint in this case . . . there is no assurance of the trustee's impartiality. The plan is controlled entirely by the employer, not by a group evenly divided between employer and employees. Because the plan is unfunded, every dollar provided in benefits is a dollar spent by defendant Firestone, the employer, and every dollar saved by the administrator on behalf of his employer is a dollar in Firestone's pocket.

Pet. App. A21-A22

may fairly be assumed that such [conflict] was contemplated by the testator." *Boston Safe Deposit & Trust Co. v. Lewis*, 317 Mass. 137, 57 N.E.2d 638, 640 (1944). In such a situation, where the settlor has sanctioned the conflict, "there is no presumption against the fiduciary based on his acting, despite divided loyalty, in the intended transaction." *Goldman v. Rubin*, 292 Md. 693, 441 A.2d 713, 724 (1982).

In light of these principles, the court of appeals plainly erred in concluding that the named fiduciary of an ERISA plan must be presumed to have acted pursuant to an improper motive simply because of the existence of the conflict of interest that arises when the plan in question is both "employer-administered" and "unfunded." Congress here, in enacting ERISA, was well aware that a large number of benefit plans are subject to the conflict of interest that the court of appeals relied on. Congress nevertheless drafted the statute to apply the usual rules of trust law to the fiduciary's conduct.

As previously noted, ERISA contains a series of substantive standards, derived from trust law, that govern the conduct of a fiduciary in administering a plan. One of those standards, set forth in Section 406(b)(2), prohibits a fiduciary, "in any transaction involving the plan," from acting on behalf of, or from representing, any party "whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries." 29 U.S.C. § 1106(b)(2). At the same time, however, Section 408(c)(3) provides that nothing in Section 406 "shall be construed to prohibit any fiduciary from serving as a fiduciary in addition to being an

officer, employee, agent, or other representative of a party in interest." *Id.* § 1108(c)(3).[6]

Like the settlor of a common law trust, therefore, Congress was aware of the potential conflict of interest, and yet left the usual rules in the statute. The existence of that conflict accordingly cannot serve as a basis for deviating from the traditional abuse of discretion standard without substantially impairing the Congressional design.[7]

C. The Abuse of Discretion Standard Is Sufficiently Flexible To Protect Plan Participants And Beneficiaries From Bias In the Fiduciary's Decision.

The decision below is quite broad in scope and would require an increasing expenditure of judicial resources in reviewing routine decisions by plan administrators under a large number of benefit plans. Unless the decision below is overturned, more disappointed claimants will be encouraged to challenge adverse decisions, so that the number of cases seeking review of benefit decisions is likely to increase dramatically. Moreover, under the court's reasoning, a presumption of partiality would apply not only in the case of unfunded plans that are administered by the employer, but also to the vast majority of other plans, such as "defined

[6] *See also*, H.R. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess. 312 (1974) ("The substitute also makes it clear that a party-in-interest may serve as a fiduciary in addition to being an officer, employee, agent or other representative of a party in interest."). The term "party in interest" is defined in the statute to include, with respect to an employee benefit plan, "an employer any of whose employees are covered by such plan." 29 U.S.C. § 1002(14)(C).

[7] The Second Circuit recognized this principle in *Morse v. Stanley*, 732 F.2d 1139, 1142 (2d Cir. 1984), when it refused to apply a presumption of partiality based on the fact that plan trustees were also members of the company's senior management.

benefit" plans, in which the amount of the employer's contribution is based upon the level of benefits expected to be payable.[8]

The court of appeals itself recognized, however, that the traditional standard of review, whether termed "abuse of discretion" or "arbitrary and capricious," is a flexible one that the courts have tailored to the particular circumstances in reviewing decisions by fiduciaries of ERISA benefit plans. *See* Pet. App. A11-A13. Thus, when the evidence indicates the possibility of bias in fact, the courts will show less deference and will engage in a more searching inquiry of the fiduciary's decision.

For example, in *Blau* v. *Del Monte Corp.*, 748 F.2d 1348 (9th Cir. 1984), *cert. denied*, 474 U.S. 865 (1985), the evidence showed that the employer-administrator had "actively concealed" the plan from employees and had failed to meet any of ERISA's procedural requirements. *Id.* at 1352. Although the court applied the arbitrary and capricious standard, it closely scrutinized the administrator's

[8] The concerns that motivated the court of appeals to impose these additional costs on benefit plans and on the courts are unfounded. From a practical standpoint, the presumption of partiality applied by the court below makes little, if any, sense. As the Seventh Circuit observed in discussing the Third Circuit's decision in this case:

> Yet even in such a case, [*i.e.*, where the plan is unfunded and employer-administered] the impact on the company's welfare of granting or denying an individual application for a pension will usually be too slight to compromise the impartiality of the trustees, even if all are appointed by the company. Nor is it in a company's long-run best interest to alienate employees by dealing unfairly with pension claims.

Van Boxel v. Journal Co. Employees' Pension Trust, 836 F.2d 1048, 1051 (7th Cir. 1987).

benefits decision in light of the "continuing procedural violations." *Id.* at 1354.[9]

The same approach was applied in *Jung* v. *FMC Corp.*, 755 F.2d 708 (9th Cir. 1985), in circumstances quite similar to those of this case. In *Jung*, FMC sold one of its divisions to a different company. The new owner agreed, as part of the sale, to offer employment to all salaried employees of the division at comparable salaries and to provide a comparable level of benefits. *Id.* at 709. The plaintiffs, suing on behalf of a class of all salaried employees of the former FMC division, sought severance pay benefits from FMC. The court refused to apply a standard of review other than the traditional arbitrary and capricious standard. *Id.* at 711. It concluded, however, that, where the administrator's decision denying benefits to a class "avoids a substantial outlay, the reviewing court should consider that fact in applying the arbitrary and capricious standard of review. Less deference should be given to the trustee's decision." *Id.* at 711-712.

In *Dockray* v. *Phelps Dodge Corp.*, 801 F.2d 1149 (9th Cir. 1986), the court noted that the decision of the plan administrator denying benefits had been made during the course of "an unusually bitter and violent" strike, *id.* at 1152, and that the applicant for benefits had been a consistent supporter of the strike. *Id.* at 1150. In view of the "highly charged atmosphere," the court concluded that, in

[9] The court explained:

> [I]n reviewing an administrator's decision, a court must consider continuing procedural violations in determining whether the decision to deny benefits in a particular case was arbitrary and capricious. We hold that the type of plan administration practiced by Del Monte is highly probative of whether a particular decision to deny benefits was infected by its having been made in conformity with the objectionable scheme.

applying the arbitrary and capricious standard, it was "unrealistic to grant the same substantial deference to the consideration of [the claimant's] application by an administrator who is also a senior member of [company] management as we would the decision of a wholly independent fund trustee in similar circumstances." *Id.* at 1153. Other courts of appeals have endorsed this flexible application of the arbitrary and capricious standard. *See, e.g., Holland* v. *Burlington Industries, Inc.*, 772 F.2d 1140, 1148-1149 (4th Cir. 1985), *cert. denied*, 477 U.S. 903 (1986); *Anderson* v. *Ciba-Geigy Corp.*, 759 F.2d 1518, 1520-1521 (11th Cir.), *cert. denied*, 474 U.S. 995 (1985).

These cases demonstrate that

> flexibility in the scope of judicial review need not require a proliferation of different standards of review; the arbitrary and capricious standard may be a range, not a point. There may be in effect a sliding scale of judicial review of trustees' decisions — more penetrating the greater is the suspicion of partiality, less penetrating the smaller that suspicion is.

Van Boxel v. *Journal Company Employees' Pension Trust*, 836 F.2d 1048, 1052-1053 (7th Cir. 1987) (citation omitted). The Seventh Circuit refused to follow the approach put forward by the Third Circuit in this case: "Flexibly interpreted, the arbitrary and capricious standard . . . allows the reviewing court to make the necessary adjustments for possible bias in the trustees' decision. So there is no urgent need to throw it overboard and cast about for an alternative verbalization." *Id.* at 1053.

II. THE COURT OF APPEALS' BROAD CONSTRUCTION OF THE TERM "PARTICIPANT" HAS NO BASIS IN THE STATUTE.

The court of appeals held that a plan administrator is required under ERISA to provide information to former employees, even if they are not eligible and have no reasonable expectation of becoming eligible for plan benefits. The court reached this result by interpreting the statutory definition of "participant" as including persons "who claim to be but in fact are not" entitled to a benefit under an ERISA-regulated plan. Pet. App. A42. This interpretation is without support in the statute.

ERISA defines "participant" as:

> any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from any employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

29 U.S.C. § 1002(7).

"The term participant is of considerable importance within ERISA's statutory scheme because numerous rights under that scheme are limited to those who are included within that term." *Saladino v. I.L.G.W.U. National Retirement Fund*, 754 F.2d 473, 476 (2d Cir. 1985). A participant must be sent certain plan documents at specified times and intervals (29 U.S.C. § 1024(b)(1)); may examine plan documents at any time at specified locations (*id.* § 1024(b)(2)); must be sent financial information on an annual basis (*id.* § 1024(b)(3)); must be sent copies of plan documents on request (*id.* § 1024(b)(4)); and must be sent information as to his accrued and nonforfeitable benefits on request once a year (*id.* § 1025(a)). In addition, a participant may institute a civil action to enforce his rights under ERISA (*id.* § 1132(a)); and may be entitled to attorneys' fees (*id.* § 1132(g)).

This case involves Section 502(c) of ERISA, 29 U.S.C. § 1132(c), which provides that a participant may recover penalties from a plan administrator for failure to respond in timely fashion to the participant's request for information. Section 502(c) states in pertinent part:

> Any administrator who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant . . . by mailing the material requested . . . within 30 days after such request may in the court's discretion be personally liable to such participant . . . in the amount of up to $100 a day from the date of such failure or refusal. . . .

In the district court, respondents sought damages under Section 502(c), alleging that the plan administrator failed to respond properly to their requests for information. The district court held that, because respondents were not entitled to benefits under any of Firestone's plans, they were not "participants" and thus could not assert a right to receive information concerning those plans. Pet. App. A69-A72.

In reversing the district court, the court of appeals read the language "any . . . former employee who . . . *may*

become eligible to receive a benefit," in the statutory definition of "participant," 29 U.S.C. § 1002(7) (emphasis added), as equivalent to "*someone who claims to be*" eligible to receive a benefit (Pet. App. A41 (court's emphasis)).

Congress could not possibly have intended this result. The words "may become eligible," in their ordinary, natural sense, refer to someone who, based on present circumstances and activities, has the opportunity to gain eligibility. In the practical application of employee benefit plans, this means someone who would be expected to attain eligibility by virtue of the passage of time, assuming that the underlying circumstances remain unchanged. This would include all present employees and those former employees who have worked for the minimum period specified in the plan but have not attained the necessary age to receive benefits. *See Nugent v. Jesuit High School of New Orleans*, 625 F.2d 1285, 1287 (5th Cir. 1980). A former employee who has no right under a particular plan to attain eligibility in the future simply does not fit within the definition of "participant," because he is not "eligible" for benefits nor is he in a position in which he "may become eligible" for benefits.

Furthermore, Congress could not have meant to require an employer to continue to send information, on a continuing basis, to all former employees, and to respond to specific requests for individualized information from former employees where those former employees have not stated a colorable claim for benefits. Yet that is the result of the court of appeals' broad reading of "participant" as including an individual "even if he is no longer an employee and is not entitled to any benefits other than those he has already received." Pet. App. A3.

As the Second Circuit has concluded, any interpretation of "participant" that would broadly include an amorphous group consisting of all former employees who merely "claim" entitlement to benefits cannot be reconciled with the statutory scheme:

> The mandatory requirement that plans send certain documents at specified intervals and annual financial information to participants strongly suggests that this group must be easily identifiable and one with a substantial interest in the matters conveyed. . . . Similarly, the provision that the plans inform participants who so request of their accrued and nonforfeitable benefits implies that the persons entitled to such disclosure have a demonstrable claim. We believe, therefore, that Congress intended the term participant to limit the various reporting and disclosure obligations imposed on plans to identifiable persons with a substantial interest in the matters conveyed and not to burden plans with the cost of reporting and disclosing to an amorphous, undefined group of individuals who lack any such interest. Any other reading of the statute would reduce the amounts available to actual beneficiaries of plans for no statutory purpose.

Saladino v. I.L.G.W.U. National Retirement Fund, 754 F.2d at 476.

In enacting ERISA, Congress recognized the voluntary nature of private benefit plans, and therefore sought to minimize the financial burdens to be placed on the system by the additional statutory requirements. *See, e.g.* H.R. Rep. No. 93-533, 93d Cong., 1st Sess. 1 (1973); 120 Cong. Rec. 4295 (1974) (remarks of Rep. Ullman). The decision below,

by requiring disclosure of plan information for an unlimited period of time to any and all former employees, would result in increased costs to benefit plans far beyond those contemplated by Congress in enacting the statute or by employers in establishing benefit plans.

The decision below also is at odds with pertinent regulations promulgated by the Department of Labor, the agency authorized to enforce ERISA and to monitor compliance with its disclosure provisions. Under these regulations, an individual is no longer a "participant" when he becomes "ineligible to receive any benefit under the plan even if the contingency for which such benefit is provided should occur." 29 C.F.R. § 2510.3-3(d)(2)(i)(A) (1987). Similarly, the regulations exclude from the definition of "participant" an individual who has incurred a one-year break in service prior to which he had acquired no vested right to a benefit; such an individual is not a participant until he has completed a year of service after returning to employment covered by the plan. *Id.* § 2510.3-3(d)(3)(i). Although these regulations are entitled to considerable deference in interpreting the statute, *e.g.*, *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965), the court of appeals failed to consider them when it promulgated its own interpretation.

The court of appeals sought to justify its expansive definition of "participant" by referring to ERISA's civil enforcement provision, which states that a civil action may be brought by a "participant." 29 U.S.C. § 1132(a)(1).[10] The court expressed the view that any individual "*who claims to be* a participant" would have standing to bring an

[10] The requirement that the plaintiff be a plan participant implicates both standing and subject matter jurisdiction requirements. *See, e.g.*, *Saporito* v. *Combustion Engineering, Inc.*, 843 F.2d 666, 671 (3d Cir. 1988); *Stanton* v. *Gulf Oil Corp.*, 792 F.2d 432, 434 (4th Cir. 1986).

action. Pet. App. A41 (court's emphasis), and it reasoned that, in similar fashion, anyone "who claims to be" eligible to receive plan benefits should have the right to receive information concerning the plan. This approach is fatally flawed.

Contrary to the assumption of the court of appeals, it is not enough for an individual merely to assert, without support, that he is a participant in order to maintain an action under ERISA against a plan administrator. Indeed, the Third Circuit itself recently held that former employees did not qualify as "participants," and thus did not have standing to pursue their claims under a particular benefit plan, because they had received a lump-sum payment of all the benefits to which they were entitled under the plan. *Saporito* v. *Combustion Engineering, Inc.*, 843 F.2d 666, 671 (3d Cir. 1988). The court of appeals' decision in *Saporito* undercuts its conclusion in this case that a person can qualify as a "participant" and can maintain an action under ERISA simply by claiming an entitlement to benefits "even if he is no longer an employee and is not entitled to benefits other than those he has already received." Pet. App. A3.

In short, a plaintiff must properly allege and prove that he is a "participant" in order to maintain an action under ERISA. The court of appeals' circular approach — that a "participant" is any person who claims to be one — begs the question of who is a "participant" and renders the statutory definition superfluous.

The court of appeals also purported to rely on ERISA's legislative history in support of its expansive definition of "participant." Pet. App. A43. The court noted that the Senate Report states that the reporting and disclosure

requirements of the statute were meant to assure "that individual *participants* . . . will be armed with enough information to enforce their own rights . . . " S. Rep. No. 93-127, 93d Cong., 1st Sess. 27 (1973) (emphasis added). But this statement confirms that Congress intended to limit disclosure to "participants" with "rights" under the plan. Here, again, the court of appeals' approach begs the question of who is a "participant."

By limiting the obligation to disclose plan information only to "participants," Congress must have contemplated that, if a former employee's written request for plan information shows on its face that his circumstances would not entitle him to benefits, the administrator need not provide the requested information. Similarly, where a former employee submits a request without supplying information concerning his employment history but the company's own records demonstrate that the individual is not eligible and will not become eligible for benefits, there is no basis in the statute for placing the administrator under the burden of providing plan information.

The court of appeals' expansive definition of "participant" appears to rest largely on the view that any other approach would make a person's entitlement to information about a plan "turn on the plan administrator's belief as to the merits of the claimant's request for benefits." Pet. App. A42. As a practical matter, this concern is unfounded. Administrators are aware that they are potentially subject to liability for substantial damages pursuant to Section 502(c) for failure to disclose requested information to participants. Accordingly, if an individual appears to have a colorable claim to benefits, the administrator will tend, in practice, to err on the side of inclusion in responding to a request for information. The problem with the decision

below is that it would require disclosure of information to persons without even a colorable claim to benefits.

The court of appeals candidly conceded that its expansive interpretation creates a major problem: "it is expensive and inefficient to provide people with information about benefits — and permitting them to obtain damages if information is withheld — if they are clearly not entitled to the benefits about which they are informed." Pet. App. A43. The court sought to alleviate this problem by stating that, "if the employee's claim for benefits is not colorable, and if the employer displayed no bad faith in responding to the claim — taking somewhat too long to respond to it, for instance, but not ignoring it entirely — then the district court would be well within its discretion in setting damages at $0." *Id.*

This response is wholly inadequate, however, because it addresses only the question of damages and does not address the significant costs that would be imposed upon the system if benefit plans were required to provide individualized information to everyone who requests it, including those who have long since left the covered employment and who have no right to benefits under the employer's benefit plans. The proper answer — and the one required by the plain language of the statute — is that a person who is neither eligible for benefits, nor in a position in which he may become eligible for benefits, is not a "participant," and is not entitled to rely on ERISA to obtain plan information or to sue for the failure to provide such information.

CONCLUSION

On both issues, the court of appeals' interpretation of the statute rests on its own weighing of policy choices. That function, however, is one for Congress and not for the courts. ERISA's language and history establish that the court of appeals' interpretation is contrary to the intent of Congress in enacting the statute. Accordingly, the judgment of the court of appeals should be reversed.

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APPENDIX

THE ERISA INDUSTRY COMMITTEE MEMBERSHIP LIST
June, 1988

Aetna Life & Casualty Co.
Alexander & Alexander Services, Inc.
Allied-Signal Inc.
Aluminum Company of America
AMAX Inc.
American Express Company
American Home Products Corp.
American Telephone & Telegraph Company
Ameritech
Amoco Corporation
Apache Corporation
Ashland Oil, Inc.
Atlantic Richfield Company
Baltimore Gas and Electric Company
Bankers Trust Company
Bell Atlantic Corporation
Bell Communications Research
BellSouth Corporation
Bethlehem Steel Corporation
The Boeing Company
Bristol-Myers Company
Buck Consultants, Inc.
Caterpillar Inc.
The Chase Manhattan Bank N.A.
Chesebrough-Pond's, Inc.
Chevron Corporation
Chrysler Corporation
CIBA-GEIGY Corp.
CIGNA Corp.
Citibank, N.A.

Columbia Gas System Service Corp.
Combustion Engineering, Inc.
Coopers & Lybrand
Dana Corporation
Deere & Company
Delta Air Lines Inc.
Digital Equipment Corp.
R. R. Donnelley & Sons Company
The Dow Chemical Company
Dresser Industries Inc.
E.I. du Pont de Nemours & Company
Eastman Kodak Company
Eli Lilly and Company
Enron Corp.
Equitable Life Assurance Society of the United States
Exxon Corporation
Federated Department Stores, Inc.
FMC Corporation
Ford Motor Company
General Electric Company
General Motors Corporation
W. R. Grace & Co.
Grumman Corporation
GTE Corporation
Gulf + Western Inc.
Frank B. Hall & Co., Inc.
John Hancock Mutual Life Ins. Co.
Hazlehurst & Associates, Inc.
Hewitt Associates
Hewlett-Packard Co.
Honeywell Inc.
ICI Americas Inc.
International Business Machines Corporation
International Paper Company
International Telephone & Telegraph Corporation

Johnson & Higgins
Johnson & Johnson
Knight-Ridder, Inc.
Kraft Inc.
Lincoln National Corporation
LTV Corp.
William M. Mercer, Incorporated
Metropolitan Life Insurance Co.
Minnesota Mining & Manufacturing Co.
Mobil Oil Corp.
MONY Financial Services
J. P. Morgan & Co. Incorporated
Motorola, Inc.
Navistar International Corporation
NYNEX Corp.
Occidental Petroleum Corporation
Olin Corporation
Pacific Gas & Electric Company
Pacific Telesis Group
J. C. Penney Co., Inc.
Pennzoil Company
Pfizer Inc.
Philip Morris, Inc.
PPG Industries, Inc.
Premark International, Inc.
Procter & Gamble Co.
The Prudential Insurance Company of America
Ralston Purina Co.
Reynolds Metals Co.
RJR Nabisco, Inc.
Rockwell International Corporation
Ryder System, Inc.
Sara Lee Corporation
Shell Oil Company
The Southland Corporation

Supermarkets General Corp.
Tenneco Inc.
Texaco Inc.
Textron Inc.
Time Incorporated
Towers Perrin Forster & Crosby
Travelers Insurance Company
TRW Inc.
Union Camp Corporation
Union Carbide Corporation
Unisys Corporation
United Technologies Corporation
USX Corp.
Westinghouse Electric Corporation
The Wyatt Company